

**A MAC Petroleum Sdn Bhd v Evermore Access Sdn Bhd and
 another appeal**

**B HIGH COURT (MELAKA) — CIVIL APPEAL
 NOS MA-12ANCC-1-01 OF 2024 AND MA-12ANCC-2-01 OF 2024
 MOHD RADZI ABDUL HAMID J
 3 MARCH 2025**

**C *Civil Procedure — Courts — Jurisdiction — Agreed exclusive jurisdiction
 clause in memorandum of understanding — Obligation of parties to submit
 dispute to International Chamber of Commerce London and London High Court
 — Whether exclusive jurisdiction clauses must be upheld — Whether exceptional
 circumstances established — Whether extenuating circumstances existed to depart
D from exclusive jurisdiction clause***

The plaintiff brought two appeals, namely: (a) Appeal No 1-01, against the decision of the sessions court under encl 6 to stay all proceedings pending adjudication of the plaintiff's claim in a foreign forum; and (b) Appeal

**E No 2-01, against the decision of the sessions court under encl 8 to not hear the
 plaintiff's application for summary judgment against the defendant following
 the sessions court decision to grant the stay. The core contention in both these
 appeals centred around the effect of a provision in an agreement called
 memorandum of understanding entered into between the parties for the
F purchase and takeover of 50,000 metric tons of Ultra Low Sulphur Diesel
 EN590 ('MOU'). The plaintiff was the purchaser whilst the seller was the
 defendant. That provision in issue was cl 9 titled applicable law which provided
 that the MOU shall be interpreted in accordance with the law and in the event
 of any dispute incapable of amicable solution, the dispute shall be submitted to
G the International Chamber of Commerce London and the London High
 Court would make the final judgment. It was the plaintiff's case that at the
 request of the defendant the plaintiff had paid to the defendant the amount of
 USD150,000 as deposit for security guarantee payment for re-routing cost of
 the product and the plaintiff then took over title of the product. In breach of
H the terms of the MOU the defendant failed to deliver the product to the
 plaintiff. The plaintiff demanded refund of the said sum and an amount of
 RM65,000 was paid by the defendant leaving a balance of USD135,555.55
 (RM610,000 equivalent). The defendant, on the other hand, claimed that it
 was the plaintiff who failed to take delivery or secure purchasers of the products
I after it arrived at OPL ('off port limit') Singapore and therefore the deposit
 payment was forfeited. As for the partial payment of RM65,000 the defendant
 claimed that the money was paid as a financial assistance to the plaintiff who
 had taken out loans to raise the security deposit. It was not a partial refund.
 Since the plaintiff failed to lift the products, it was the plaintiff who committed**

a breach of the MOU. In allowing the stay, the sessions court held that: (i) where there was a contractually agreed exclusive jurisdiction clause requiring parties to adjudicate any dispute in the agreed foreign jurisdiction then such clause must be upheld; (ii) the express provisions of cls 9 and 11 of the MOU clearly obligated parties to submit any dispute to the High Court in London; and (iii) to refuse the stay would amount to condoning a breach of the agreement by the plaintiff.

A

B

Held, allowing the Appeal No 1–01 and setting aside the Appeal No 2–01:

- (1) Exclusive jurisdiction clauses must be upheld unless the plaintiff could show exceptional circumstances to hold otherwise. In arriving at his decision the sessions court judge committed an error in applying the law when he confined himself to just upholding the exclusive jurisdiction clause without addressing whether there exist exceptional circumstances in favour of refusing the stay. There was absence of critical evaluation of the issues and the facts (see paras 21 & 24).
- (2) Both the disputing parties in the appeal were companies incorporated and residents in Malaysia. Hence, the convenience to have the matter adjudicated in Malaysia not only served the plaintiff but the defendant equally. On the issue of applicable law, cl 11 did not specify which law was to apply to the MOU. It merely stated in general term that it should be interpreted in accordance with law. It did not state that the MOU and any dispute arising from it shall be governed by the laws of England. Therefore, in absence of a specific reference to any other law, the MOU was governed by the laws of Malaysia since the MOU was contracted in Malaysia between Malaysian incorporated companies who were carrying out their businesses in Malaysia (see paras 25–26 & 28).
- (3) Whilst the sanctity and intent of the mutually agreed terms of contract must be preserved and enforced it should not stop the court from considering extenuating circumstances as in this appeal. Other than insisting on the court to enforce cl 11 as being an agreed contractual term, the court did not find how the defendant would be disadvantaged if the dispute was resolved in Malaysia where it was resident. The defendant's insistence on the application of cl 11 of the MOU was seen more as a procedural strategy than to genuinely place the dispute before the High Court in London (see para 29).
- (4) The plaintiff had shown exceptional circumstances or strong reasons for disallowing the stay. Therefore, the appeal in Appeal No 1–01 was allowed and the decision of the sessions court was set aside. Consequentially, the decision of the sessions court in Appeal 2–01 was therefore set aside. The sessions court was therefore directed to hear the plaintiff's application for summary judgment under encl 8 (see paras 30–31).

C

D

E

F

G

H

I

A [Bahasa Malaysia summary]

Plaintif telah memulakan dua rayuan, iaitu: (a) Rayuan No 1–01, terhadap keputusan mahkamah sesyen di bawah lampiran 6 untuk menggantung semua prosiding sementara menunggu adjudikasi tuntutan plaintif di forum asing; dan (b) Rayuan No 2–01, terhadap keputusan mahkamah sesyen di bawah lampiran 8 untuk tidak mendengar permohonan penghakiman terus oleh plaintif terhadap defendan berikutan keputusan mahkamah sesyen untuk memberikan penggantungan tersebut. Isu pokok dalam kedua-dua rayuan ini berpusat kepada kesan suatu peruntukan dalam satu perjanjian yang dinamakan memorandum persefahaman yang dimeterai antara pihak-pihak bagi pembelian dan pengambilalihan 50,000 tan metrik Ultra Low Sulphur Diesel EN590 ('MOU'). Plaintiff adalah pembeli manakala penjual adalah defendan. Peruntukan yang menjadi isu adalah klausa 9 bertajuk undang-undang terpakai yang memperuntukkan bahawa MOU hendaklah ditafsirkan selaras dengan undang-undang dan sekiranya berlaku apa-apa pertikaian yang tidak dapat diselesaikan secara baik, pertikaian tersebut hendaklah dikemukakan kepada International Chamber of Commerce London dan Mahkamah Tinggi London akan memberikan penghakiman muktamad. Ia adalah kes plaintif adalah bahawa atas permintaan defendan, plaintif telah membayar kepada defendan sejumlah USD150,000 sebagai deposit bagi bayaran jaminan keselamatan untuk kos penghalauan semula produk dan plaintif kemudiannya telah mengambil alih hak milik ke atas produk tersebut. Dalam pelanggaran terma MOU, defendan telah gagal menyerahkan produk tersebut kepada plaintif. Plaintiff menuntut pemulangan semula jumlah tersebut dan sejumlah RM65,000 telah dibayar oleh defendan, meninggalkan baki sebanyak USD135,555.55 (bersamaan RM610,000). Defendan, sebaliknya, mendakwa bahawa ia adalah plaintif yang gagal mengambil penyerahan atau mendapatkan pembeli bagi produk selepas ia tiba di OPL ('off port limit') Singapura dan oleh itu bayaran deposit dilucuthakkan. Berhubung dengan bayaran sebahagian sebanyak RM65,000, defendan mendakwa bahawa wang tersebut dibayar sebagai bantuan kewangan kepada plaintif yang telah mengambil pinjaman bagi mengumpulkan deposit jaminan. Ia bukanlah bayaran balik sebahagian. Oleh kerana plaintif gagal mengambil produk, maka ia adalah plaintif yang telah melakukan pelanggaran MOU. Dalam membenarkan penggantungan, mahkamah sesyen telah memutuskan bahawa: (i) apabila terdapat klausa bidang kuasa eksklusif yang dipersetujui secara kontrak yang menghendaki pihak-pihak mengadjudikasikan apa-apa pertikaian di bidang kuasa asing yang dipersetujui maka klausa tersebut hendaklah dipatuhi; (ii) peruntukan nyata klausa 9 dan 11 MOU dengan jelas mewajibkan pihak-pihak mengemukakan apa-apa pertikaian kepada Mahkamah Tinggi di London; dan (iii) menolak penggantungan akan terjumlah kepada membenarkan pelanggaran perjanjian oleh plaintif.

Diputuskan, membenarkan Rayuan No 1–01 dan mengetepikan Rayuan No 2–01:

- (1) Klausula bidang kuasa eksklusif hendaklah dipatuhi melainkan plaintif dapat menunjukkan keadaan luar biasa untuk menentukan sebaliknya. Dalam membuat keputusan beliau, hakim mahkamah sesyen telah melakukan kesilapan dalam mengguna pakai undang-undang apabila beliau hanya terikat untuk menegakkan klausula bidang kuasa eksklusif tanpa meneliti sama ada terdapat keadaan luar biasa yang memihak kepada penolakan penggantungan. Terdapat ketiadaan penilaian kritikal terhadap isu dan fakta (lihat perenggan 21 & 24). A
B
C
- (2) Kedua-dua pihak dalam pertikaian dalam rayuan ini adalah syarikat yang diperbadankan dan bermastautin di Malaysia. Oleh itu, kemudahan untuk mengadili perkara ini di Malaysia bukan sahaja memberi manfaat kepada plaintif tetapi juga defendan. Mengenai isu undang-undang terpakai, klausula 11 tidak menyatakan undang-undang mana yang terpakai kepada MOU. Ia hanya menyatakan secara umum bahawa ia hendaklah ditafsirkan selaras dengan undang-undang. Ia tidak menyatakan bahawa MOU dan apa-apa pertikaian yang timbul daripadanya hendaklah ditadbir oleh undang-undang England. Oleh itu, dengan ketiadaan rujukan khusus kepada mana-mana undang-undang lain, MOU ditadbir oleh undang-undang Malaysia memandangkan MOU telah dimeterai di Malaysia antara syarikat yang diperbadankan di Malaysia yang menjalankan perniagaan di Malaysia (lihat perenggan 25–26 & 28). D
E
F
- (3) Walaupun kesucian dan niat terma kontrak yang dipersetujui bersama mesti dipelihara dan dikuatkuasakan, ia tidak seharusnya menghalang mahkamah daripada mempertimbangkan keadaan yang meringankan sebagaimana dalam rayuan ini. Selain daripada menegaskan supaya mahkamah menguatkuasakan klausula 11 sebagai suatu terma kontraktual yang dipersetujui, mahkamah tidak mendapati bagaimana defendan akan terjejas sekiranya pertikaian diselesaikan di Malaysia di mana ia bermastautin. Penegasan defendan terhadap penggunaan klausula 11 MOU dilihat lebih kepada suatu strategi prosedural berbanding meletakkan pertikaian secara tulen di hadapan Mahkamah Tinggi di London (lihat perenggan 29). G
H
- (4) Plaintif telah menunjukkan keadaan luar biasa atau alasan kukuh untuk menolak penangguhan. Oleh itu, rayuan dalam Rayuan No 1–01 dibenarkan dan keputusan mahkamah sesyen diketepikan. Secara berbangkit, keputusan mahkamah sesyen dalam Rayuan 2–01 juga diketepikan. Mahkamah sesyen dengan itu diarahkan untuk mendengar permohonan plaintif bagi penghakiman terus di bawah lampiran 8 (lihat perenggan 30–31).] I

A Cases referred to

Ambico Offshore Sdn Bhd v Sapura Fabrication Sdn Bhd [2022] MLJU 2663; [2022] CLJU 2523, HC (refd)

CHE Group Bhd v Dato Kweh Tean Aik [2019] MLJU 782; [2019] 1 LNS 1292, HC (refd)

B *Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Bhd* [1976] 2 MLJ 154; [1976] 1 LNS 31; [1976] CLJU 31, FC (refd)

Intergraph Cadworx & Analysis Solutions, Inc v EDS Asia Sdn Bhd [2013] 8 MLJ 729, HC (refd)

C *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1; [2019] CLJU 1066, FC (refd)

Kraken Services Ltd (formerly known as Kraken Reinsurance Services Ltd) v Q Life and Medical Insurance Company Asia Region & Anor [2021] MLJU 2956; [2021] 1 LNS 2602; [2021] CLJU 2602, HC (refd)

D *Niaga Tani Sdn Bhd v Samarez Holdings Bhd* [2002] MLJU 140; [2002] 7 CLJ 327, HC (refd)

Nutri Mills Products Sdn Bhd v CMA CGM Malaysia Sdn Bhd & Anor [2013] 8 MLJ 377, HC (refd)

Open Country Dairy Ltd v Able Food Sdn Bhd [2021] MLJU 969; [2021] 7 CLJ 716, CA (refd)

E *The Eleftheria; Owners of Cargo Lately Laden on Board Ship or Vessel Eleftheria v Owners of Ship or Vessel Eleftheria* [1969] 2 All ER 641; [1969] 1 Lloyd's Rep 237 (refd)

United Overseas Bank Ltd & Ors v United Securities Sdn Bhd (in liquidation) & Ors [2021] 6 MLJ 897, CA (distd)

F *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] SGCA 65, CA (distd)

World Triathlon Corp v SRS Sports Centre Sdn Bhd [2019] 4 MLJ 394; [2018] 6 AMR 122; [2018] AMEJ 0843; [2019] 1 CLJ 381, CA (refd)

G *Chew Wee Kian (with Melissa Ong Bee Ying) (HS Chew & Co) for the appellant. Yong Li Yang (Rohani Soon & Assoc) for the respondent.*

Mohd Radzi Abdul Hamid J:

H MATTER BEFORE THIS COURT

I [1] This is a decision on two appeals each brought by the plaintiff in Appeals No MA-12ANCC-1-01 of 2024 and MA-12ANCC-2-01 of 2024 against the decision of the sessions court under Civil Suit No MA-B52-NCC-32-08 of 2023. Appeal 1-01 is against the decision of the sessions court under encl 6 to stay all proceedings pending adjudication of the plaintiff's claim in a foreign forum. Appeal 2-01 is against the decision of the sessions court under encl 8 to not hear the plaintiff's application for summary judgement against the defendant following the sessions court decision to grant the stay.

BACKGROUND FACTS

A

[2] The core contention in both these appeals centers around the effect of a provision in an agreement called memorandum of understanding dated 17 March 2023 entered into between the parties for the purchase and takeover of 50,000 metric tons of Ultra Low Sulphur Diesel EN590 ('MOU'). The plaintiff is the purchaser whilst the seller is the defendant. That provision in issue appears as cl 9 titled Applicable Law which provides that the MOU shall be interpreted in accordance with the law and in the event of any dispute incapable of amicable solution, the dispute shall be submitted to the International Chamber of Commerce London and the London High Court will make the final judgment.

B

C

[3] It is the plaintiff's case that at the request of the defendant the plaintiff had paid to the defendant the amount of USD150,000 as deposit for security guarantee payment for re-routing cost of the product and the plaintiff then took over title of the product. In breach of the terms of the MOU the defendant failed to deliver the product to the plaintiff. The plaintiff demanded refund of the said sum and an amount of RM65,000 was paid by the defendant leaving a balance of USD135,555.55 (RM610,000 equivalent).

D

E

[4] The defendant on the other hand claims that it was the plaintiff who failed to take delivery or secure purchasers of the products after it arrived at OPL ('off port limit') Singapore and therefore the deposit payment was forfeited. As for the partial payment of RM65,000 the defendant claims that the money was paid as a financial assistance to the plaintiff who had taken out loans to raise the security deposit. It was not a partial refund. Since the plaintiff failed to lift the products it was the plaintiff who committed a breach of the MOU.

F

G

[5] The defendant contends that by operation of cl 9 of the MOU the dispute must be referred to the High Court in London since it was an express and agreed contractual term between the parties.

DECISION OF THE SESSIONS COURT

H

[6] In deciding in favor of allowing the stay, the sessions court held that the decisions of the Court of Appeal in *United Overseas Bank Ltd & Ors v United Securities Sdn Bhd (in liquidation) & Ors* [2021] 6 MLJ 897 and *Open Country Dairy Ltd v Able Food Sdn Bhd* [2021] MLJU 969; [2021] 7 CLJ 716 had clearly held that where there is a contractually agreed exclusive jurisdiction clause requiring parties to adjudicate any dispute in the agreed foreign jurisdiction then such clause must be upheld. The learned judge opined that the express provisions of cll 9 and 11 of the MOU clearly obligated parties to

I

A submit any dispute to the High Court in London. The learned judge also found that to refuse the stay would amount to condoning a breach of the agreement by the plaintiff.

THE LAW

B [7] To begin with this court refers the Court of Appeal decision in *World Triathlon Corp v SRS Sports Centre Sdn Bhd* [2019] 4 MLJ 394; [2018] 6 AMR 122; [2018] AMEJ 0843; [2019] 1 CLJ 381 (CA) where it was held that Malaysian courts are obliged to give effect to an agreed jurisdiction clause. C Disregarding such a clause would effectively mean the courts condoning a breach of the agreement. The Court of Appeal went on to hold that notwithstanding the general position that such clauses must be upheld, that position may be reversed if 'the party challenging the exclusive jurisdiction clause is able to show exceptional circumstances amounting to a strong D cause' warranting a refusal to give effect to such an agreement:

E [20] On the question of how such discretion is to be exercised when confronted with a foreign jurisdiction clause, the then Federal Court in *Globus Shipping* accepted the approach as summarised by Brandon J in *The Eleftheria; Owners of Cargo Lately Laden on Board Ship or Vessel Eleftheria v Owners of Ship or Vessel Eleftheria* [1969] 2 All ER 641; [1969] 1 Lloyd's Rep 237 as follows:

The principles established by the authorities can, I think, be summarised as follows:

F (a) where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not;

(b) the discretion should be exercised by granting a stay unless strong cause for not doing so is shown;

G (c) the burden of proving such strong cause is on the plaintiffs;

(d) in exercising its discretion, the court should take into account all the circumstances of the particular case;

(e) in particular, but without prejudice to;

H (f) the following matters, where they arise, may properly be regarded:

I (i) in what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts;

(ii) whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects;

(iii) with what country either party is connected, and how closely;

(iv) whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages;

- (v) whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:
 - (1) be deprived of security for that claim;
 - (2) be unable to enforce any judgment obtained;
 - (3) be faced with a time-bar not applicable in England; or
 - (4) for political, racial, religious or other reasons be unlikely to get a fair trial.

A

B

D

E

F

G

H

I

[21] So, to surmise, where there is an exclusive jurisdiction clause, effect should be given to it and a stay ought to be granted, unless the party challenging the exclusive jurisdiction clause is able to show exceptional circumstances amounting to a strong cause warranting a refusal. The burden is on the party challenging the exclusive jurisdiction clause to show why they should not be bound to honour the part of the contract where they had agreed to jurisdiction.

[8] Thus based on *World Triathlon* and the decision of the Federal Court in *Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Bhd* [1976] 2 MLJ 154; [1976] 1 LNS 31; [1976] CLJU 31 the onus would be on the plaintiff seeking to oust the application of the exclusive jurisdiction clause to show the exceptional circumstances. This approach was also applied by the Court of Appeal in *Open Country Dairy Ltd v Able Food Sdn Bhd* [2021] MLJU 969; [2021] 7 CLJ 716 where it was held:

[79] It is therefore clear that there was an exclusive jurisdiction clause per cl 19.2 of the terms of trade and this was incorporated in the contracts for the purchase of the IWMP. Therefore, the respondent must be held to their bargain and a Malaysian court is obliged to give effect to the exclusive jurisdiction clause, unless the respondent, as the party seeking to avoid the application of the clause, are able to establish that there are exceptional circumstances to justify the contrary (see: *World Triathlon*).

[80] Having carefully examined the record of appeal, we did not find any convincing evidence that would qualify as exceptional circumstances to justify not giving effect to the exclusive jurisdiction clause. Of course, from the perspective of the respondent, it would be quite unfair for the action to be filed in the New Zealand courts as they had paid a substantial sum to the appellant and would have to incur further costs in having to file and prosecute their action in New Zealand.

[81] But then again, those were the terms upon which they had contracted with the appellant when they agreed to purchase the latter's goods. Whatever the inconvenience that the respondent may be put to is purely a consequence of their agreement. The respondent's complaint in having to file the action in New Zealand is a complaint that can cut both ways. The appellant can easily mount a like counter argument particularly when it is clear that the action ought to have been filed in New Zealand in accordance with cl 19.2 of the terms of trade.

[9] Therefore it is clear based on those decisions that the starting position is

- A that an exclusive jurisdiction clause must be upheld and enforced by the court unless the plaintiff can satisfy the court of the existence of exceptional circumstances justifying the non-enforcement of that clause.

ARGUMENTS OF PARTIES

- B [10] The plaintiff submitted that the exceptional circumstances in favor of adjudicating the dispute in Malaysia are:
- C (a) there is no genuine dispute by the defendant against the plaintiff's claim since by tendering part refund of RM65,000 the defendant has admitted to its liability;
- D (b) cl 9 of the MOU does not stipulate that the applicable law governing the contract is English law and does not expressly state that the High Court in London shall have exclusive jurisdiction to determine any dispute;
- E (c) the payment of the security deposit and part refund was made in Malaysia;
- F (d) both the plaintiff and the defendant are companies incorporated and resident in Malaysia;
- G (e) all relevant witnesses reside in Malaysia;
- H (f) all relevant evidence to the dispute are in Malaysia;
- I (g) since both parties are Malaysians, it would therefore make both logistical and economic sense for the dispute to be adjudicated in Malaysia; and
- (h) the defendant's reliance on cl 9 of the MOU is merely to frustrate or delay the plaintiff's claim.
- G [11] Reference was made to the decisions in *Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Bhd* [1976] 2 MLJ 154; [1976] 1 LNS 31; [1976] CLJU 31; *Ambico Offshore Sdn Bhd v Sapura Fabrication Sdn Bhd* [2022] MLJU 2663; [2022] CLJU 2523; *Niaga Tani Sdn Bhd v Samarez Holdings Bhd* [2002] MLJU 140; [2002] 7 CLJ 327; *CHE Group Bhd v Dato Kweh Team Aik* [2019] MLJU 782; [2019] 1 LNS 1292; *Nutri Mills Products Sdn Bhd v CMA CGM Malaysia Sdn Bhd & Anor* [2013] 8 MLJ 377 and *Intergraph Cadworx & Analysis Solutions, Inc v EDS Asia Sdn Bhd* [2013] 8 MLJ 729.
- I [12] In arguing for the enforcement of cl 9 of the MOU, the defendants state that:
- (a) the products did not originate from Malaysia;
- (b) the port of loading and discharge of the products are not in Malaysia;
- (c) the original supplier of the products is not in Malaysia;

- (d) the trade currency is not in the Malaysian currency; A
- (e) the payment of RM65,000 was not a part refund but financial assistance;
- (f) the express provision of cl 9 reemphasised by cl 11 of the MOU which states that any dispute arising from the indemnity given by the seller shall be subject to the jurisdiction of the High Court in London; and B
- (g) that cl 9 is an expressed provision of the MOU which must be given its full effect and not rendered irrelevant and redundant.

[13] Reference was made to the decisions in *United Overseas Bank Ltd & Ors v United Securities Sdn Bhd (in liquidation) & Ors* [2021] 6 MLJ 897; *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] SGCA 65; and *Kraken Services Ltd (formerly known as Kraken Reinsurance Services Ltd) v Q Life and Medical Insurance Company Asia Region & Anor* [2021] MLJU 2956; [2021] 1 LNS 2602; [2021] CLJU 2602. C D

DELIBERATIONS

[14] Before moving to the deliberations on the merits of this appeal it would be necessary to reproduce cl 9 and the relevant parts of cl 11 of the MOU: E

Clause 9:

9. APPLICABLE LAW

9.1 This MOU shall be interpreted in accordance with the law and in the event of any dispute incapable of amicable solution, the dispute shall be submitted to the International Chamber of Commerce London and London High Court will make the final judgment. F

Clause 11:

11. LETTER OF INDEMNITY (LOI) for Title Take Over deliveries: G

...

We hereby warrant to you that at the time the title is transferred as specified under the terms of the above agreement we had the right to sell the cargo to you and we had unencumbered title to the said cargo. H

...

We hereby ... indemnify you ... against any claim made against you by anyone as a result of breach by us of any of our warranties as set out above ...

.. all disputes, controversies or claims arising out of or in relation to this indemnity or the breach, termination or validity hereof shall be subject to the exclusive jurisdiction of the High Court of Justice in London, England. I

[15] Now, the facts of the case as narrated by the defendant in encls 7 and

- A 13/pp 24 and 58 of the record of appeal is that the products originated from Kazakhstan and routed to OPL Singapore. The products arrived in Singapore on 16 March 2023. However, despite requests the plaintiff failed to do the CIQ/SGS inspection on the products and off load the products since it did not secure buyers for them. After waiting a few days, the vessel then left OPL
B Singapore with the products.

- [16] Thus, as far as the defendant is concerned the original ownership of the products at the port of loading in Kazakhstan, type or specifications of the products and transportation of the products are not matters in issue. They
C cannot be an issue anyhow because according to the defendant the products arrived at OPL Singapore on 16 March 2023 whilst the MOU was signed only on the 17th and the security deposit totaling USD150,000 was only paid on 17 March 2023 and 20 March 2023.

- D [17] After considering the respective affidavits this court finds that the core dispute between the parties is about delivery and payment when the products was still on-board vessel at OPL Singapore. The plaintiff claims that the defendant failed to deliver whilst the defendant claims that the plaintiff failed
E to take delivery or secure buyers for the products. Thus, there is no dispute involving any party in Kazakhstan, any owner of the vessel or any party claiming ownership of the products anywhere between Kazakhstan and Singapore.

- F [18] Now, in all the cases referred to by both parties with exception of *Vinmar Overseas* at least one of the disputing parties was a non-resident of the country where the claim was filed. In *Globus Shipping*, the defendant was resident in Singapore, in *World Triathlon* the defendant was established in USA, in *Open Country Dairy* the defendant was incorporated in New Zealand,
G in *United Overseas Bank*, the defendant was incorporated in Singapore and in *Kraken Reinsurance Services*, the second defendant was incorporated in Qatar. In *Vimar Overseas*, both plaintiff and defendant are companies incorporated in Singapore.

- H [19] In *Globus Shipping*, the Federal Court agreed with the High Court that the convenience of the case preferred the dispute to be resolved in Malaysia where witnesses are in Penang and the laws between Malaysia and Singapore are not dissimilar. In *World Triathlon*, the Court of Appeal held that since the termination of the license agreement occurred in Florida, USA then Florida
I should be the forum for adjudication of the dispute. The Court of Appeal did not agree with the findings of the High Court that since relevant witnesses and evidence relating to the sports event that was governed by the license agreement was in Malaysia then the dispute ought to be resolved in Malaysia. The court also took into account that the laws of USA may differ and it would have been

costly to call experts witnesses to Malaysia to testify on US laws. In *Open Country Dairy*, the Court of Appeal held that inconvenience which may be caused to the plaintiff to have the dispute resolved in New Zealand is not a sufficient factor to justify preferring the matter to be heard in Malaysia. In *United Overseas Bank*, the issue of jurisdiction involved the construction of a provision that contained a non exclusive obligation on the part of the borrower to submit to the jurisdiction of the Singapore court and the exclusive jurisdiction right of the lender to sue the borrower anywhere it chooses. The Court of Appeal held that the borrower was bound to submit to the jurisdiction of the Singapore courts. It must be noted that the Court of Appeal did not as a matter of consideration discuss on whether there were any exceptional circumstances justifying refusal of the stay although it referred to the decisions in *World Triathlon* and *Open Country Dairy*. In *Kraken Reinsurance*, the High Court found that the conduct of parties showed that the plaintiff had substantially dealt with the second defendant which is based in Qatar and therefore the issues in dispute should be resolved in Qatar as agreed under the exclusive jurisdiction clause of their agreement. The High Court did not find that difficulties in language afforded exceptional circumstances since it was just speculative.

[20] In *Vinmar Overseas*, referred to by the defendant the Singapore Court of Appeal took the position that an exclusive jurisdiction clause should be upheld unless there is a strong case justifying otherwise. The clause in that case required parties to refer any dispute to the High Court of England sitting in London. The court discussed, inter alia, the factors justifying refusal of stay as laid out in the English case of *The Eleftheria; Owners of Cargo Lately Laden on Board Ship or Vessel Eleftheria v Owners of Ship or Vessel Eleftheria* [1969] 2 All ER 641; [1969] 1 Lloyd's Rep 237. In deciding to uphold the clause despite both parties being resident in Singapore, the court held that issue of whether the defendant has merits in its defence is irrelevant and that the factors which render proceedings in Singapore more convenient than proceedings in the agreed forum are of limited weight if they were foreseeable at the time when the parties made the jurisdiction agreement. In that case the Court of Appeal held that the plaintiff's argument that the defendant had no defence was not a strong case to justify refusing the stay.

[21] Coming back to the Appeal presently, it should be emphasised that the Federal Court's decision in *Globus Shipping* remains good law and therefore the court's view as conveyed by Gill CJ that the court has the discretion whether or not to adjudicate a dispute despite parties' agreement to submit such dispute to a foreign jurisdiction is binding on this court. It should be noted that the Federal Court accepted the approach taken in *The Eleftheria*. In addition, this court is also bound by the decisions in *World Triathlon* and *Open Country Dairy* that held exclusive jurisdiction clauses must be upheld unless the

A plaintiff can show exceptional circumstances to hold otherwise.

[22] In *The Elefteria* the relevant principles to the exercise of the court's discretion was set out as follows:

B The principles established by the authorities can, I think, be summarised as follows:

(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not

C (2) The should be exercised by granting a stay unless strong cause for not doing so is shown.

(3) The burden of proving such strong cause is on the plaintiffs.

D (4) In exercising its discretion, the court should take into account all the circumstances of the particular case.

(5) In particular, but without prejudice to (4), the following matters, where they arise may properly be regarded:

E (a) In what country the evidence on the issues is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts.

(b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects.

F (c) With what country either party is connected, and how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:

G

(i) be deprived of security for their claim;

(ii) be unable to enforce any judgment obtained;

(iii) be faced with a time-bar not applicable in England; or

H

(iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

I [23] In *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1; [2019] CLJU 1066 the Federal Court held that to refuse a stay would require strong reasons and such reasons will be based on facts and circumstances:

[52] Stating the matter very generally, in an application for injunction to restrain or stay arbitration proceedings, or for an anti-suit injunction which has the effect of

- preventing a party from bringing a claim in any forum other than the forum parties agree to submit, strong reasons are required to displace the contractual obligation entered into in relation to an arbitration clause or an exclusive jurisdiction clause. Suffice if we refer to one leading English authority in support of this proposition. The decision of the House of Lords in the case of *Donohue v Armco Inc and others* [2002] 1 All ER (Comm) 97 bears out exactly the logical basis for the above proposition in the following passages:
- Per Lord Bingham at p 107 in para [24] E-H: Where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case. ...
- [24] Returning now to the session court's grounds of judgment it can be seen that in arriving at his decision the learned judge did not give any attention and consideration to whether there are exceptional circumstances. In this court's view, the learned judge had committed an error in applying the law when he confined himself to just upholding the exclusive jurisdiction clause without addressing whether there exist exceptional circumstances in favor of refusing the stay. There was absence of critical evaluation of the issues and the facts.
- [25] Foremost, in this court's view, unlike the cases referred earlier with the exception of *Vinmar Overseas* both the disputing parties in this appeal are companies incorporated and resident in Malaysia. By contrast, in those cases referred above, the locus of the foreign jurisdiction stipulated in the respective contracts or agreements coincides with where the defendant was incorporated or resident. There is no connection between the defendant and England in the present appeal unlike the defendants in *United Overseas*, *World Triathlon* and *Open Country Dairy*. This meets the consideration at part 4(c) of *The Elefteria*.
- [26] Now, that factor is not considered in isolation but also considered together with the following matters:
- (a) the dispute here does not involve consideration of facts that occurred in Kazakhstan but just next door to Malaysia, ie Singapore;
 - (b) the dispute only involves the issue whether the defendant failed to deliver the products as claimed by the plaintiff or whether it is the plaintiff who failed to secure purchasers for the products at OPL Singapore as claimed by the defendant;
 - (c) whether the products had in fact arrived in Singapore as claimed by the defendant can be answered by the Singapore port authorities and it would be nearer for such witnesses to come to Malaysia if needed than to go to London;

- A (d) the convenience to have the matter adjudicated in Malaysia not only serves the plaintiff but the defendant equally;
- (e) the provision under cl 9 does not require the dispute to be adjudicated applying laws of England; and
- B (f) the use of English law that may have required the High Court in London to adjudicate on the claim as stated in cl 11 is not applicable as the plaintiff's claim is not premised on a breach of indemnity with respect to title in the products but on failure to deliver them. All these factors satisfy part 4(a) of *The Eleftheria*.
- C

[27] Even if the defendant's case requires the calling of witnesses other than from Malaysia and Singapore there is no impediment for such witnesses to give evidence via online proceedings from anywhere in the world which has now become the norm in dispute resolution since the Covid-19 pandemic. Notwithstanding that parties may have agreed to exclusive jurisdiction clauses, it must be said that the reality of how trials are conducted have drastically changed. The need for cross border travelling to foreign jurisdictions to adjudicate disputes are now mitigated by the use of online proceedings.

D

E [28] On the issue of applicable law, cl 11 does not specify which law is to apply to the MOU. It merely states in general term that it shall be interpreted in accordance with law. It does not state that the MOU and any dispute arising from it shall be governed by the laws of England. Therefore, in absence of a specific reference to any other law, this court holds that the MOU is governed by the laws of Malaysia since the MOU was contracted in Malaysia between Malaysian incorporated companies who are carrying out their business in Malaysia.

F

G [29] Whilst this court agrees that the sanctity and intent of the mutually agreed terms of contract must be preserved and enforced it should not stop the court from considering extenuating circumstances such as that are present in this appeal. Other than insisting on this court to enforce cl 11 as being an agreed contractual term, this court does not find how the defendant would be disadvantaged if the dispute is resolved in Malaysia where it is resident. The defendant's insistence on the application of cl 11 of the MOU is seen more as a procedural strategy than to genuinely place the dispute before the High Court in London.

H

I CONCLUSION AND DECISION

[30] In conclusion this court finds that there are merits in the plaintiff's appeal. This court is satisfied that the plaintiff has shown exceptional circumstances or strong reasons for disallowing the stay.

[31] Therefore the appeal in Appeal No 1–01 is hereby allowed and the decision of the sessions court is set aside. Consequentially, the decision of the sessions court in Appeal 2–01 is therefore set aside. As a matter of natural course, the sessions court is therefore directed to hear the plaintiff’s application for summary judgement under encl 8. Costs for both appeals ordered cumulatively in the amount of RM2,500.

Appeal No 1–01 allowed; and Appeal No 2–01 set aside.

Reported by K Selvaraju

A

B

C

D

E

F

G

H

I